

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

J.D. JONES BARTON,

Petitioner,

v.

PATRICK R. GLEBE,

Respondent.

NO. C10-5511 RJB/KLS

ORDER DENYING PETITIONER'S
MOTION TO PROHIBIT
TRANSFER AND ORDER
EXTENDING PETITIONER'S TIME
TO RESPOND TO ORDER TO
SHOW CAUSE

Before the court is Petitioner's Motion to Not Transfer Petitioner to Another DOC Facility Pursuant to FRAP 23(a)(d). ECF No. 24. Respondent filed a response opposing the motion. ECF No. 26. On November 9, 2010, Petitioner filed a notice that he was transferred and has not yet received his legal materials. ECF NO. 27. Having reviewed the motion, response and balance of the record, the court finds that Petitioner's motion should be denied, but that he should be given additional time to respond to the court's Order to Show Cause. ECF No. 23.

BACKGROUND

Mr. Barton filed his federal habeas corpus petition on July 21, 2010. ECF No. 1. Respondent filed a motion to stay Mr. Barton's habeas petition on September 3, 2010. ECF No. 21. The court issued an Order denying the Respondent's motion to stay and directed Mr.

1 Barton to show cause why his petition should not be dismissed without prejudice for failure to
2 exhaust on or before November 12, 2010. ECF No. 23. On October 15, 2010, Mr. Barton filed
3 the present motion requesting the court to prohibit the Department of Corrections (DOC) from
4 moving him to another DOC facility. ECF No. 24. Mr. Barton argues that the DOC has no
5 authority/jurisdiction to house/confine him and that his sentence is void on its face. *Id.*, p. 4.
6

7 **DISCUSSION**

8 It is well established that the Secretary of the Department of Corrections alone has the
9 statutory authority and discretion to determine the correctional institution in which any
10 offender will reside. RCW 72.02.210; RCW 72.02.240; RCW 72.68.010. It is equally well
11 established that the Constitution does not guarantee that the convicted prisoner will be placed
12 in any particular prison. The initial decision to assign a prisoner to a particular institution is
13 not subject to audit under the Due Process Clause, although the degree of confinement in one
14 prison may be quite different from that in another. The conviction has sufficiently
15 extinguished the defendant's liberty interest to empower the State to confine him in any of its
16 prisons. *Meachum v. Fano*, 427 U.S. 215, 224-228 (1976); *see also, Olim v. Wakinekona*, 461
17 U.S. 238, 245-46, 249 (1983).
18

19 Mr. Barton's reliance on Fed.R.App.P. 23(a) is misplaced. That rule prohibits the
20 transfer of custody of a prisoner pending review of a decision in a habeas proceeding without
21 an order of the court rendering the decision. The purpose of the rule is "to prevent prison
22 officials from impeding a prisoner's attempt to obtain habeas corpus relief by physically
23 removing the prisoner from the territorial jurisdiction of the court in which a habeas petition is
24 pending." *Goodman v. Keohane*, 663 F.2d 1044, 1047 (11th Cir.1981); *see Jago v. United*
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1 *States District Court, Northern District of Ohio, Eastern Division at Cleveland*, 570 F.2d 618,
 2 626 (6th Cir.1978). It does not appear in this case that the state's transfer of Mr. Barton from
 3 the Stafford Creek Corrections Center to the Washington State Penitentiary violated Rule 23(a)
 4 since the transfer within this state does not defeat the jurisdiction of this court. In addition, the
 5 court has not rendered any decision on the merits of Mr. Barton's habeas petition. Rather, the
 6 court has directed Mr. Barton to show cause by November 12, 2010 as to why his petition
 7 should not be dismissed without prejudice for failure to exhaust. ECF No. 23.

9 Since filing his motion, Mr. Barton was transferred from the Stafford Creek Corrections
 10 Center to the Washington Corrections Center in Shelton, Washington. ECF No. 27. Mr.
 11 Barton states that, as of November 9, 2010, he had not received his legal materials. *Id.*

12 Accordingly, it is **ORDERED**:

13 (1) Petitioner's Motion to Not Transfer (ECF No. 24) is **DENIED**.

14 (2) Petitioner is granted an extension to file a response to the court's Order to Show
 15 Cause (ECF No. 23) until **December 17, 2010**.

16 (3) The Clerk shall send copies of this Order to Petitioner and to counsel for
 17 Respondent.
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19 DATED this 17th day of November, 2010.

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22 Karen L. Strombom
 23 United States Magistrate Judge
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